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Southern Utah Wilderness Alliance

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS
ALLIANCE,

Plaintiff,

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT, and HARRY BARBER, in
his official capacity as Paria River District
Manager,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Case No. 2:20cv539 JCB
Magistrate Judge Jared C. Bennett

1. This lawsuit challenges the Bureau of Land Management's ("BLM") arbitrary decision that Kane County, Utah's ("Kane County") proposed construction and installation of a new bridge across Bull Valley Gorge along the Skutumpah Road was maintenance, as opposed to improvement, of the road. BLM reached this decision despite that the former bridge was made of packed dirt whereas the new, engineered bridge has concrete footings, a metal travel surface, and requires an altered vertical alignment, among other improvements. BLM's erroneous decision was arbitrary and capricious, and it violated BLM's duties according to the Federal Land Policy and Management Act ("FLPMA") and its implementing regulations, along with BLM's own policies.

2. Because BLM reached this erroneous conclusion, it allowed Kane County to commence construction activities without first determining whether the improvement was within the scope of the county's R.S. 2477 right-of-way over the road or complying with its duties to protect the surrounding lands in accordance with FLPMA. This arbitrary and capricious decision similarly violated FLPMA, its implementing regulations, and BLM's own policies.

3. This lawsuit also challenges BLM's decision to allow construction activities without first complying with the National Environmental Policy Act ("NEPA") and its implementing regulations. NEPA and its regulations require BLM to follow the precautionary principle of "think first, then act." Instead, BLM authorized the County to proceed without first considering the impacts of that decision.

4. At issue in this case is the section of the Skutumpah Road which crosses Bull Valley Gorge within the Grand Staircase-Escalante National Monument as established by President Clinton, and which currently forms the boundary of the reduced Monument's "Grand

Staircase unit,” as established by President Trump. This segment of the road is also a boundary of the Paria-Hackberry wilderness study area (“WSA”) and lands BLM has identified as possessing wilderness characteristics. The construction and installation of an engineered bridge at Bull Valley Gorge will unlawfully impair and impact the Paria-Hackberry WSA and impact the Grand Staircase-Escalante National Monument.

5. As set forth below, BLM’s decision that it had no role to play in evaluating and approving the County’s proposed improvement and to instead allow construction activities to proceed without BLM approval was arbitrary and capricious.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief); and the Administrative Procedure Act (“APA”) 5 U.S.C. §§ 501-706.

7. Venue is proper in the United States District Court for the District of Utah, Central Division, pursuant to 28 U.S.C. § 1391(e)(1) because the statutory violations alleged herein all occurred within the State of Utah.

8. BLM’s decision to allow Kane County to install an improved, engineered bridge across Bull Valley Gorge on the Skutumpah Road, without following the required administrative procedure for approval, constitutes final agency action.

PARTIES

9. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE (“SUWA”) is a nonprofit environmental membership organization dedicated to the preservation of outstanding wilderness and other spectacular public lands found throughout Utah, including those

surrounding the Skutumpah Road, and the management of wilderness-quality lands in their natural state for the benefit of all Americans. SUWA is headquartered in Salt Lake City, Utah and has members in all fifty states and several foreign countries. SUWA's members use and enjoy public lands throughout Utah for a variety of purposes, including scientific study, recreation, wildlife viewing, aesthetic appreciation, viewing cultural and historic artifacts, and financial livelihood. SUWA promotes local and national recognition of the region's unique character through research and public education, and supports administrative and legislative initiatives to permanently protect Utah's wild places. SUWA brings this action on its own behalf and on behalf of its members.

10. SUWA and its members' interests have been directly affected and irreparably harmed, and continue to be affected and harmed, by BLM's decision to allow Kane County to proceed with the installation of an improved, engineered bridge across Bull Valley Gorge without BLM approval—in violation of FLPMA, NEPA, and their implementing regulations, as well as the proclamations establishing and reducing the Grand Staircase-Escalante national monument and the APA. SUWA members frequently visit the abutting Grand Staircase-Escalante National Monument, Paria-Hackberry WSA, and Bull Valley Gorge itself and recreate throughout those places.

11. Mr. Ray Bloxham, an employee and member of SUWA, has traveled the Skutumpah Road, viewed and hiked in Bull Valley Gorge, and recreated on the federal public lands adjacent to the Road, including the Grand Staircase-Escalante National Monument and Paria-Hackberry WSA, on numerous occasions over the past several years, including most recently in October 2019. Mr. Bloxham particularly enjoys the solitude and scenic views, as well

as hiking and photographing the lands surrounding Bull Valley Gorge. Mr. Bloxham has plans to return to this area again in the fall of 2020, and intends to continue to visit the area for years to come.

12. Ms. Kya Marienfeld, an employee and member of SUWA, has traveled the Skutumpah Road across Bull Valley Gorge and hiked in the gorge itself. She has also recreated and viewed the solitude, unique geology, and wildlife on the federal public lands on either side of the Bull Valley Gorge bridge in the Grand Staircase-Escalante National Monument and Paria-Hackberry WSA. Ms. Marienfeld most recently visited this area in October 2019 and plans to return in the late summer or early fall of 2020, and intends to continue the visit the area 1-3 times per year for the foreseeable future.

13. As a result of BLM's legal failings, the construction activities, along with the resulting impacts to the Grand Staircase-Escalante National Monument and Paria-Hackberry WSA, will adversely alter the remote and rugged nature of the lands and resources surrounding the route. This will impair Plaintiff's staffs' and members' use and enjoyment of the federal public lands contiguous and nearby to the Bull Valley Gorge bridge, as well as Bull Valley Gorge itself. SUWA and its members also have a substantial interest in seeing that BLM complies with its land management standards and obligations under federal laws including FLPMA, NEPA, their implementing regulations, the monument proclamations, and BLM's own policies in furtherance thereof. The relief sought herein, including an order that BLM comply with NEPA, will redress these harms.

14. Defendant BUREAU OF LAND MANAGEMENT is the agency within the United States Department of the Interior that is responsible for the management of approximately

twenty-three million acres of federal public land in Utah, including the land at issue in this litigation. BLM is directly responsible for carrying out the Department of the Interior's obligations under statutes and regulations governing land use management. These obligations include complying with FLPMA, which requires the agency to manage public land resources for both present and future generations, and NEPA, which requires the agency to carefully consider the environmental impacts of its actions.

15. Defendant HARRY BARBER is the BLM's Paria River District Manager and is charged with overseeing BLM's activities in that office. District Manager Barber decided that Kane County's installation of the new, upgraded bridge at Bull Valley Gorge would not require BLM approval.

FACTS GIVING RISE TO SUWA'S CAUSES OF ACTION

I. Skutumpah Road

16. The Skutumpah Road is a graded dirt road in Kane County that runs generally east to west, from the Cottonwood Road, just south of Cannonville, to Johnson Canyon. The County has classified the road as a "Class B" road, meaning generally that the County maintains the road to a certain standard and in turn can and does seek reimbursement from the State of Utah for its road maintenance activities.

17. The Skutumpah Road is presently used for a variety of purposes including ranching, tourism, and facilitating travel in western Kane County. Kane County and the State of Utah jointly hold title to an R.S. 2477 right-of-way for the approximately 33 mile length of the Skutumpah Road. *Kane Cty., Utah (1) v. United States*, No. 2:08-cv-00315-CW, 2011 WL 2489819, at *2 (D. Utah June 21, 2011); *Kane Cty., Utah (1) v. United States*, No. 2:08-cv-

00315-CW, 2013 WL 1180764, at *1 (D. Utah Mar. 20, 2013), *rev'd and remanded on other grounds*, 772 F.3d 1205 (10th Cir. 2014).

18. The scope of the County and State's R.S. 2477 right-of-way has not been adjudicated. *Kane Cty. v. United States*, 772 F.3d 1205 (10th Cir. 2014).

II. Bull Valley Gorge

19. The eastern extent of the Skutumpah Road crosses Bull Valley Gorge, a narrow slickrock canyon. The crossing was comprised of compacted native material, including dirt and rock. In 1954, a truck slid off the Skutumpah Road, became lodged in Bull Valley Gorge, and remains partially in place today.

20. Bull Valley Gorge is a popular hiking and sightseeing destination. The gorge and the portion of the Skutumpah Road across it are within the original Grand Staircase-Escalante National Monument, established by President Clinton, and form a boundary of the reduced monument, as modified by President Trump. The Paria-Hackberry WSA borders the Skutumpah Road to the south at Bull Valley Gorge crossing, and lands BLM has identified as having wilderness character lie to the north.

21. BLM's Grand Staircase-Escalante National Monument management plan (2000) contemplated "allow[ing a] new crossing for safety at Bull Valley Gorge." Plan at 47. The plan noted that a future decision to widen the crossing may be allowed, subject to BLM's WSA policies. The plan does not approve a particular course of action regarding the new crossing. BLM's Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area management plan (2020) incorporated the 2000 plan's decision with regard to the Skutumpah Road and Bull Valley Gorge crossing. Plan at 2-59.

III. A New, Engineered Bridge at Bull Valley Gorge Crossing

22. In March 2019, a storm event washed out a large portion of the earthen crossing at Bull Valley Gorge and made the crossing unsafe to travel with motorized vehicles.

23. Based on information and belief, from March 2019 through May 2020 Kane County and BLM engaged in a dialogue about repairing or replacing the crossing at Bull Valley Gorge. The options discussed included repairing the earthen bridge, utilizing a temporary “Bailey”-style bridge (a portable, prefabricated bridge), or improving the crossing by installing a new, permanent engineered bridge.

24. On May 8, 2020 Kane County’s GIS and Transportation Director, Mr. Louis Pratt, sent a letter to BLM’s Kanab field office manager, Mr. Whit Bunting, stating that the County intended to proceed with the installation of a new, engineered bridge. Mr. Pratt’s letter explains that “[t]he project will consist of engineered concrete headwalls poured in place to establish the base on either side of the gorge. Kane County will contract out the footings and assembly of the bridge structure to be placed across the gorge and dropped into place on the concrete footings. (see enclosed plans).” Mr. Pratt further explained “Kane County will utilize borrow/imported fill to allow traffic to safely cross the replaced bridge structure,” and noted that all proposed disturbance would be within the width of the current disturbed area. Mr. Pratt further stated that “[r]eplacing the bridge with a new engineered structure is the only way at this time to ensure future public safety needs.” A copy of Mr. Pratt’s May 8, 2020 letter is attached hereto as Exhibit A.

25. SUWA obtained a copy of the plans Kane County submitted to BLM for the engineered bridge through a Freedom of Information Act request to BLM’s Utah State Office.

The plans make clear that in addition to concrete footings, the engineered bridge will require excavation and a change to the vertical alignment of the Skutumpah Road. The new engineered bridge will also have a metal travel surface, as opposed to the prior earthen surface.

26. On June 8, 2020 SUWA sent a letter to BLM's Acting Utah State Director and Paria River District Manager regarding Kane County's proposal. SUWA explained that the County's proposal constituted an improvement to the Skutumpah Road and was not merely maintenance. SUWA also noted that the scope of the State and County's R.S. 2477 right-of-way had not yet been adjudicated and reminded BLM that it needed to comply with NEPA and FLPMA as part of its review of the County's proposal. SUWA suggested that BLM and Kane County include SUWA in the discussions regarding the proposed improvement. A copy of SUWA's June 8, 2020 letter is attached hereto as Exhibit B.

27. SUWA also forwarded a copy of its June 8 letter to BLM to attorneys representing Kane County and the State of Utah and invited a dialogue between SUWA, Kane County, the state of Utah, and BLM. Neither Kane County nor Utah substantively responded to SUWA's letter.

28. On June 22, 2020 acting associate state director Abbie Josie responded to SUWA's letter in an email stating that BLM was "still reviewing and considering the request from the county. No decisions have been made."

29. On June 30, 2020 Mr. Pratt sent a follow-up letter to BLM manager Bunting and informed him that Kane County had awarded a contract for the new bridge and stated "the county will proceed with the replacement to reopen the road – especially before winter

conditions make it impossible to finish the work for another year.” A copy of Mr. Pratt’s June 30 letter is attached hereto as Exhibit C.

30. On July 13, 2020 SUWA was notified in an email from the U.S. Department of Justice that “BLM has informed us that the [County’s] proposal to replace the bridge does not require approval by the BLM,” and directed questions regarding this decision to BLM’s Paria River district manager, Mr. Barber. A copy of this email, which was provided pursuant to a Notice Order in a separate matter, is attached hereto as Exhibit D.

31. On July 14, 2020 attorneys representing SUWA spoke with BLM manager Barber regarding this matter, and on July 16, 2020 these same attorneys for SUWA sent a letter to Mr. Barber summarizing the call. SUWA’s letter refuted Mr. Barber’s contention that the new engineered bridge constituted maintenance of, rather than improvement to, the Skutumpah Road, citing the Tenth Circuit’s opinion in *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.* (“SUWA v. BLM”), 425 F.3d 735 (10th Cir. 2005) and BLM’s own guidance on this matter. A copy of SUWA’s July 16, 2020 letter is attached hereto as Exhibit E.

32. Based on information and belief, contractors acting on behalf of Kane County began surface disturbing operations related to the new bridge on or around the week of July 13, 2020. These activities include, but are not limited to, vertical realignment of the Skutumpah Road and the pouring of cement footings.

33. BLM did not prepare a NEPA document (an environmental impact statement, environmental assessment, or categorical exclusion) prior to deciding that the County’s proposal did not require agency approval.

IV. Consultation Regarding Improvements to Adjudicated R.S. 2477 Rights-of-Way

34. The Tenth Circuit has stated that “construction of improvements” of R.S. 2477 rights-of-way include “the horizontal or vertical realignment of the road as well as any significant change in the surface composition of the road (e.g. going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any ‘improvement,’ ‘betterment,’ or any other change in the nature of the road that may significantly impact [public] lands, resources, or values.” *SUWA v. BLM*, 425 F.3d at 748-49 (quoting *United States v. Garfield Cty.*, 122 F. Supp. 2d 1201, 1253 (D. Utah 2000)).

35. In contrast, the Tenth Circuit has explained that maintenance “‘preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road . . . essentially preserving the status quo.’” *Id.* (quoting *Garfield Cty.*, 122 F. Supp. 2d at 1253).

36. BLM’s internal guidance regarding improvements to R.S. 2477 rights-of-way, Instruction Memorandum (IM) No. 2008-175, relies essentially verbatim on the Tenth Circuit’s definition in *SUWA v. BLM* of maintenance and improvements. BLM Instruction Memorandum No. 2008-175, Consultation Process on Proposed Improvements to Revised Statute (R.S.) 2477 Rights-of-Way (Aug. 8, 2008) at 2-3. A copy of Instruction Memorandum 2008-175 is attached hereto as Exhibit F.

37. If title to an R.S. 2477 claim has been adjudicated under the Quiet Title Act, the holder of the right-of-way must consult with BLM before it undertakes improvements to the right-of-way. *See Kane Cty.*, 772 F.3d at 1224-25. No consultation is required for the R.S. 2477 right-of-way holder to conduct merely routine maintenance. *Id.*

38. The goal of consultation is to allow BLM to determine if the proposed improvement is “reasonable and necessary” and within the scope of the existing right-of-way, and thus part of a valid existing right. *Id. See also* IM 2008-175, at 4-7 (outlining multi-step consultation process).

39. Consultation provides an opportunity for BLM to comply with its obligations under FLPMA “to take any action necessary to prevent unnecessary or undue degradation of the [public] lands” and prevent impairment to the Paria-Hackberry WSA, 43 U.S.C. §§ 1732(b), 1782(c), as well as its obligation under the 1996 and 2017 Grand Staircase-Escalante National Monument proclamations to protect monument objects.

40. If, through the consultation process, BLM determines that improvements go beyond the scope of an R.S. 2477 right-of-way and not part of a valid existing right, the holder must apply for and obtain a separate right-of-way authorization under FLPMA Title V, 43 U.S.C. §§ 1761–1772, and its implementing regulations.

41. BLM erroneously decided Kane County’s installation of a new, engineered bridge constituted maintenance and not improvement to the Skutumpah Road. As a result, BLM did not engage in consultation with Kane County about the proposed improvement. Consequently, BLM did not consider the environmental impacts of the improvement, whether the improvement would degrade or impair surrounding federal lands, or decide whether the improvement fell within the scope of the county’s right-of-way. These failures violated BLM’s legal obligations.

First Cause of Action

Violation of FLPMA, Monument Proclamations, and APA (*Arbitrarily Deciding Installation of the New Bridge was Maintenance*)

42. SUWA incorporates by reference all preceding paragraphs.

43. FLPMA and its implementing regulations require BLM to regulate the use, occupancy, and development of public lands. 43 U.S.C. §1732(b).

44. FLPMA directs BLM to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” *Id.*

45. FLPMA directs BLM to manage WSAs “in a manner so as not to impair the suitability of such areas for preservation as wilderness.” *Id.* § 1782(c).

46. The 1996 Grand Staircase-Escalante National Monument Proclamation, as well as the 2017 proclamation modifying it, direct BLM to protect Monument objects.

47. An R.S. 2477 right-of-way holder may undertake routine maintenance of the right-of-way without first consulting and receiving authorization from BLM.

48. In contrast, an R.S. 2477 right-of-way holder’s proposed improvement to the right-of-way requires consultation between BLM and the holder to evaluate the proposal.

49. Before allowing a proposed improvement to an R.S. 2477 right-of-way as an exercise of a valid existing right, BLM must determine if the improvement is within the scope of the right-of-way and thus part of a valid existing right. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

50. “If the BLM determines that a proposed improvement is within the scope of an R.S. 2477 right-of-way it must assess whether the proposed improvement may adversely impact the surrounding public lands or resources and, if so, whether there are alternatives or modifications to the proposed improvement that would avoid or minimize such impacts.” IM

2008-175, at 6. *See SUWA v. BLM*, 425 F.3d at 748. This consultation process is intended to further BLM's land management responsibilities.

51. BLM improperly determined Kane County's proposed installation of a new engineered bridge was maintenance of the County's right-of-way, and not an improvement.

52. BLM failed to determine whether Kane County's proposed improvement to the Skutumpah Road was within the scope of the County's R.S. 2477 right-of-way.

53. Alternatively, to the extent BLM concluded that the proposed improvement was within the scope of the right-of-way by relying on the County's argument that the installation of the new bridge, the change in vertical alignment to the road, and the new concrete footings were allegedly within the current disturbed width, that conclusion was erroneous.

54. BLM did not fulfill its land management responsibilities to prevent impairment to the Paria-Hackberry WSA, harm to monument objects in the Grand Staircase-Escalante National Monument, and unnecessary or undue degradation to all the lands it oversees.

55. BLM's determination that Kane County's proposed installation of a new, engineered bridge at Bull Valley Gorge crossing on the Skutumpah Road constituted maintenance of the County's R.S. 2477 right-of-way, and that the County could thus proceed with surface disturbing activities, without BLM approval, was arbitrary, capricious, and contrary to law in violation of 5 U.S.C. § 706(2)(A).

Second Cause of Action
Violation of FLPMA and APA

(Failure to Determine if the Improvement was a Valid Existing Right)

56. SUWA incorporates by reference all of the preceding paragraphs.

57. FLPMA and its implementing regulations require BLM to regulate the use, occupancy, and development of public lands. 43 U.S.C. §1732 (b).

58. The use, occupancy, or development of public lands in a manner contrary to any applicable regulation is unlawful and prohibited. 43 U.S.C. § 1733(g).

59. When authorizing road improvements, BLM must comply with the requirements and procedures contained in Title V of FLPMA and its implementing regulations. 43 U.S.C. §§ 1761–72; 43 C.F.R. Part 2800.

60. BLM is not required to issue a new right-of-way permit under Title V prior to road construction only if it determines the improvement will occur within the scope a “valid existing right.” 43 U.S.C. § 1701; Pub. Law 94-579, §701 note (h).

61. Kane County holds an adjudicated R.S. 2477 right-of-way to the Skutumpah Road, but the scope of the right-of-way has not yet been adjudicated or otherwise determined.

62. BLM’s approval of construction of a new, engineered bridge on the Skutumpah Road without first determining whether the improvement fell within this scope of the right-of-way violated FLPMA’s Title V provisions and implementing regulations, and was arbitrary, capricious, and contrary to the law in violation of 5 U.S.C. §706(2)(A).

Third Cause of Action
Violation of NEPA and APA

(Failure to Take a Hard Look at Environmental Impacts)

63. SUWA incorporates by reference all the preceding paragraphs.

64. NEPA requires BLM to analyze environmental consequences before initiating actions that potentially affect the environment. 42 U.S.C. § 4332(2)(C). It may do so in an environmental impact statement (EIS), environmental assessment (EA), or categorical exclusion (CX), but cannot exempt itself from complying with NEPA.

65. An agency may prepare an EA to determine whether an EIS is necessary, 40 C.F.R. § 1501.3, but if an agency decides not to prepare an EIS, an EA must provide “sufficient evidence” that a full EIS is not necessary. *Id.* § 1508.9. In certain limited circumstances BLM may also prepare a categorical exclusion to document its compliance with NEPA. *Id.* § 1501.4.

66. The threshold to trigger environmental analysis under NEPA is relatively low, requiring only a substantial question as to whether an action may cause environmental impacts sufficient to trigger NEPA.

67. BLM must both take a “hard look” at potential environmental consequences of its actions and make the relevant information available to the public.

68. Under NEPA, federal agencies must consider the direct, indirect and cumulative environmental impacts of a project. 40 C.F.R. §§ 1508.8, 1508.25(c).

69. To comply with NEPA’s hard look requirement, BLM’s analysis must involve informed decisionmaking and informed public participation, along with discussion of possible effects and risks.

70. BLM violated NEPA and its implementing regulations by exempting itself from complying with the statute and by failing to take a hard look at impacts from Kane County’s installation of a new engineered bridge at Bull Valley Gorge to a variety of resources, including

but not limited to, the Paria-Hackberry WSA and Grand Staircase-Escalante National Monument.

71. BLM also violated NEPA and its implementing regulations by failing to take a hard look at impacts from the new bridge and reasonably foreseeable improvements to the Skutumpah Road, including Kane County's proposal to pave four miles of the road near Johnson Canyon and/or gravel the road to approximately Deer Springs Ranch.

72. BLM's failure to take a hard look at environmental impacts violated NEPA and its implementing regulations and was arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court enter judgment in its favor and against Defendants the Bureau of Land Management and Harry Barber, in his official capacity as the Paria River District Manager of the Bureau of Land Management; and that the Court:

(1) Declare that Defendants have violated FLPMA, BLM Instruction Memorandum 2008-175, and the APA, as set forth above;

(2) Declare that Defendants have violated NEPA as set forth above;

(3) Award injunctive relief directing Defendants to consult with Kane County about its improvement to the Skutumpah Road and determine if the improvement is within the scope of the County's right-of-way;

(4) Award injunctive relief directing Defendants to prepare a NEPA analysis regarding the installation of an engineered bridge at Bull Valley Gorge along the Skutumpah Road;

(5) Award injunctive relief directing Defendants to prohibit further construction activities until BLM has complied with FLPMA and NEPA as set forth above.

(6) Retain jurisdiction of this action to ensure compliance with its decree;

(7) Award Plaintiff's costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

(8) Grant such other and further relief as is proper.

Dated: July 29, 2020

Respectfully submitted,

/s/ Stephen Bloch

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Southern Utah Wilderness Alliance

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

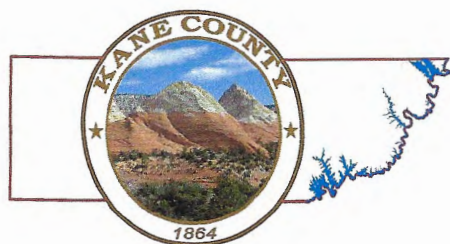
Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Exhibit A



**Kane County GIS/Transportation Dept.
Kane County Courthouse**

**76 N. Main St.
Kanab, Utah 84741
(435)-644-4968 (OFFICE)
(435) 644-2052 (FAX)
gis@kane.utah.gov**

DATE: May 8, 2020
TO: Kanab Field office BLM
FROM: Kane County GIS / Transportation
SUBJECT: Bull Valley Gorge Bridge

Dear Mr. Whit Bunting:

Kane County's plans to install an engineered replacement bridge across the Bull Valley Gorge location since the old bridge has fell through effectively closing the road to all traffic (SEE MAP). Kane County is purchasing a new bridge from Big R Manufacturing. The old bridge eroded and collapsed some time prior to March 31, 2019. The collapse is approximately 80% of the roadway width is no and has been temporarily closed since that day.

Kane County will utilize this new bridge to get the Skutumpah Road also known as K5000 back open for public use. Complications prevented Kane County from getting work completed last fall prior to winter conditions closing the area until spring. Kane County has contracted Big R Manufacturing to design and construct a new bridge for this location.

The project will consist of engineered concrete headwalls poured in place to establish the base on either side of the gorge. Kane County will contract out the footings and assembly of the bridge structure to be placed across the gorge and dropped into place on the concrete footings, (see enclosed plans).

The Skutumpah Road was adjudicated to be an RS2477 Road in March 3, 2013. Kane County has had all existing disturbed areas identified and surveyed and the completion of this project will ensure that 100% of the temporary replacement bridge will lie within any previously disturbed road construction area.

Kane County will open bids on May 19th to start the construction process for bridge installation. Kane County anticipates the contractor will need to complete the footings and bridge construction by September 30st, 2020. Kane County will utilize borrow / imported fill as needed to allow traffic to safely cross the replaced bridge structure.

Kane County maintains the Skutumpah Road as a Class B Kane County Road and maintained at a minimum of twice every year depending on weather conditions where more maintenance may be required. Past history of bridge maintenance besides grading road and bridge surface has been done on as needed basis, twice that I can recall since my employment in 1986 we had to close the road and repair the bridge. Replacing the bridge with a new engineered structure is the only way at this time to ensure future public safety needs.

Sincerely,

A handwritten signature in blue ink, appearing to read "Louis L. Pratt, Jr.", is written over a horizontal line.

Louis L. Pratt, Jr.
Kane County GIS / Transportation Director

Exhibit B



Sent Via Email (abilbao@blm.gov and hbarber@blm.gov) and U.S. Mail

June 8, 2020

Anita Bilbao, Acting State Director
Bureau of Land Management, Utah State Office
440 West 200 South, Suite 500
Salt Lake City, Utah 84101

Harry Barber, District Manager
Paria River District
669 S. Highway 89A
Kanab, UT 84741

Re: *Kane County Proposal to Install an Engineered Bridge where the Skutumpah Road Crosses Bull Valley Gorge*

Dear Director Bilbao and Manager Barber,

This letter is in regard to the proposal submitted by Kane County to BLM on May 8, 2020, regarding the installation of an engineered bridge where the Skutumpah Road crosses Bull Valley Gorge, located within the original boundary of the Grand Staircase-Escalante national monument and adjacent to the Paria-Hackberry wilderness study area. The Skutumpah Road is presently impassable to regular motorized vehicle use at this crossing because a washout that occurred last year eroded much of the dirt travel surface.

We understand that the County's proposed improvements include a metal travel surface on the bridge, cement footings and grade changes at either end of the crossing; these changes to the bridge and the road's alignment indicate that the County has proposed *improvements*¹ to as opposed to maintenance of the road.²

¹ The Tenth Circuit has recognized that "construction of *improvements*" includes "the horizontal or vertical realignment of the road" as well as the installation (as opposed to the replacement in kind) of a bridge. *SUWA v. BLM*, 425 F.3d 735, 749 (10th Cir. 2005) (quoting *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1253 (D. Utah 2000)).

² The 2000 Grand Staircase-Escalante national monument management plan contemplated a "new crossing" along the Skutumpah Road at Bull Valley Gorge that could exceed the then-current travel width of the road, but neither authorized any particular proposal nor evaluated the environmental impacts of such an improvement. *See* Management Plan at 47 (TRAN-7). The recently approved Management Plan for the Kanab-Escalante Planning Area states that BLM

SUWA and TWS letter

Re: Kane County Proposal to Install an Engineered Bridge on Skutumpah Road at Bull Valley Gorge

June 8, 2020

As you know, the scope of Kane County and the State of Utah's R.S. 2477 right-of-way over the Skutumpah Road has not yet been adjudicated. The scope of this right-of-way is one of three such determinations still to be made in the long running Quiet Title Act litigation titled *Kane County, Utah and the State of Utah v. United States and SUWA*, 2:08cv315 CW (D. Utah). Southern Utah Wilderness Alliance and The Wilderness Society are intervenors as-of-right and full parties in this ongoing case.

As BLM reviews the County's proposed improvements it is important to keep in mind that BLM must comply with its statutory obligations to prevent impairment to the adjacent Paria-Hackberry wilderness study area as well as to prevent undue and unnecessary degradation. This is so regardless of whether some part of the County's proposed improvements may be within the yet to be determined scope of its right-of-way and/or within the present disturbed width of the Skutumpah Road.³ BLM must also identify, analyze and disclose the impacts of and alternatives to the County's proposal in an appropriate NEPA analysis. Given the undetermined scope of its right-of-way and the nature of the proposed improvements, it may be more expeditious for the County to seek approval for this activity through a FLPMA Title V right-of-way.

We appreciate the County's need to repair the Bull Valley Gorge crossing and make the Skutumpah Road serviceable to county residents and visitors alike and would welcome the opportunity to be included in consultation between BLM and the County to discuss how best to quickly arrive at that conclusion. Please contact Steve Bloch (801.428.3981; steve@suwa.org) to discuss this matter.

Sincerely,



Stephen Bloch
Michelle White
Southern Utah Wilderness Alliance

Cc: Phil Hanceford, The Wilderness Society

will follow the 2000 GSENM plan until new travel management planning is completed at some point in the future. See Kanab-Escalante Planning Area Final EIS at 2-58.

³ The Tenth Circuit has explained that the extent of the current disturbed width is not determinative as to either the scope of a right-of-way or the ability of the right-of-way holder to unilaterally undertake improvements. *SUWA*, 425 F.3d at 746-48. Thus, even if all of the County's proposed improvements to the Bull Valley Gorge crossing are within the current disturbed width of the Skutumpah Road, that does not mean those activities are necessarily within the adjudicated scope of the County and State's right-of-way.

Exhibit C



**Kane County GIS/Transportation Dept.
Kane County Courthouse**

**76 N. Main St.
Kanab, Utah 84741
(435)-644-4968 (OFFICE)
(435) 644-2052 (FAX)
gis@kane.utah.gov**

DATE: June 30, 2020
TO: Kanab Field office BLM
FROM: Kane County GIS / Transportation
SUBJECT: Bull Valley Gorge Bridge

Dear Mr. Whit Bunting:

Kane County has previously corresponded with you about the need to replace the bridge at the Bull Valley Gorge location after the old bridge fell into the gorge. Kane County would like to let you know that it has awarded the contract for the replacement bridge and the county will proceed with the replacement to reopen the road – especially before winter conditions make it impossible to finish the work for another year.

The Skutumpah Road is an important road in the county and we appreciate the BLM's interest in this matter.

Sincerely,

A handwritten signature in blue ink, reading "Louis L. Pratt Jr.", is written over a horizontal line.

Louis L Pratt Jr
Kane County GIS / Transportation Director

Exhibit D

From: [Philpott, Romney \(ENRD\)](#)
To: [Guzy, Gary](#); [Heidi McIntosh](#); [Fein, Ian](#); [Iwata, Jackie](#); [James Pew](#); [Mizerak, John](#); [Desormeau, Kate](#); [sbuccino@nrdc.org](#); [Steve Bloch](#); [ychi@earthjustice.org](#)
Cc: [Coleman, Judith \(ENRD\)](#)
Subject: RE: Notice under Notice Order in TWS v. Trump
Date: Monday, July 13, 2020 12:18:32 PM
Attachments: [BULL VALLEY BRIDGE LETTER_6302020.pdf](#)

Counsel,

We are following up on our May 16 email below. As indicated in the attached letter, Kane County has informed the BLM that it has awarded a contract to replace the Bull Valley Gorge bridge and that it will be moving forward on the project. Because the BLM has informed us that the proposal to replace the bridge does not require approval by the BLM, the Notice Order does not apply and any questions about this matter should be directed to the BLM's Paria River District Manager.

Sincerely,

Romney S. Philpott
U.S. Department of Justice
999 18th St. #370
Denver, CO 80202
(303) 844-1810

From: Philpott, Romney (ENRD)
Sent: Saturday, May 16, 2020 12:42 AM
To: 'Guzy, Gary' <GGuzy@cov.com>; 'Heidi McIntosh' <hmcintosh@earthjustice.org>; 'Fein, Ian' <ifein@nrdc.org>; 'Iwata, Jackie' <jjiwata@nrdc.org>; 'James Pew' <jpew@earthjustice.org>; 'Mizerak, John' <JMizerak@cov.com>; 'Desormeau, Kate' <kdesormeau@nrdc.org>; 'sbuccino@nrdc.org' <sbuccino@nrdc.org>; 'Steve Bloch' <steve@suwa.org>; 'ychi@earthjustice.org' <ychi@earthjustice.org>
Cc: Coleman, Judith (ENRD) <JColeman3@ENRD.USDOJ.GOV>
Subject: Notice under Notice Order in TWS v. Trump

Counsel,

On May 8, 2020 the BLM received a proposal from Kane County to install an engineered bridge where the Skutumpah Road crosses the Bull Valley Gorge, in order to replace the old bridge, which collapsed more than a year ago, eliminating approximately 80% of the dirt crossing. The collapse of the old bridge has created an ongoing safety hazard, and the road has been temporarily closed to all through traffic since March 31, 2019. This project would occur in an area excluded from the Monument. We are providing you notice out of an abundance of caution, to the extent it is arguably subject to disclosure under Section 1.d of the Notice Order.

Sincerely,

Romney S. Philpott
U.S. Department of Justice
999 18th St. #370
Denver, CO 80202
(303) 844-1810

Exhibit E



Sent Via Email (hbarber@blm.gov) and U.S. Mail

July 16, 2020

Harry Barber, District Manager
Paria River District
669 S. Highway 89A
Kanab, UT 84741

Re: *Kane County Proposal to Install an Engineered Bridge where the Skutumpah Road Crosses Bull Valley Gorge*

Dear Harry,

We wanted to thank you again for your time Tuesday morning to discuss Kane County's proposed installation of an engineered bridge where the Skutumpah Road crosses Bull Valley Gorge. Through the course of our conversation it became unmistakable that what Kane County has proposed is an *improvement*¹ to the Skutumpah Road, and not simply maintenance of the status quo. This is so even though Kane County may have taken what you described as a "minimalist approach" to the new bridge. Indeed, the fact that the County's proposal involves a change to vertical alignment of the Skutumpah Road, the installation of concrete footings, a change in travel surface, as well as the fact that the County proposes to move forward with the most substantial change it considered² all confirm that the new bridge is an improvement and thus BLM has a role to play in evaluating and approving this proposal.

You acknowledged that the scope of the County's adjudicated R.S. 2477 right-of-way has not yet been determined but maintained that the County's proposed activities are within the current disturbed width and thus "not excessive." We explained that in *Southern Utah Wilderness Alliance v. Bureau of Land Management* the Tenth Circuit made clear the extent of the current disturbed width is not determinative as to either the scope of a right-of-way or the ability of the

¹ As we noted in our June 8, 2020 letter, the Tenth Circuit has recognized that "construction of *improvements*" includes "the horizontal or vertical realignment of the road" as well as the installation (as opposed to the replacement in kind) of a bridge. *SUWA v. BLM*, 425 F.3d 735, 749 (10th Cir. 2005) (quoting *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1253 (D. Utah 2000)).

² We discussed on the call how the County and BLM went back-and-forth about re-establishing the earthen bridge as well as using a military-style temporary crossing, but instead the County ultimately settled on its current proposal to install an engineered bridge.

SUWA letter

Re: Follow-up to July 14, 2020 phone call regarding Kane County Proposal to Install an Engineered Bridge on Skutumpah Road at Bull Valley Gorge

July 16, 2020

right-of-way holder to unilaterally undertake improvements. Again, BLM cannot disregard its role in evaluating the County's proposed improvement.

Finally, whatever informal guidance has been provided regarding this matter by Interior Department solicitors or Department and Bureau officials in Washington, D.C. cannot change the fact that BLM's decision – conveyed Monday by the Justice Department – to allow Kane County's proposal for an improvement to the Skutumpah Road to proceed without consultation and affirmative BLM approval, is arbitrary and capricious. Given that installation of an engineered bridge would constitute an improvement, BLM must comply with its current guidance, IM 2008-175.

Once again, we appreciate the County's desire to make the Bull Valley Gorge crossing and the Skutumpah Road serviceable to county residents and visitors alike and would welcome the opportunity to be included in consultation between BLM and the County to discuss how best to quickly arrive at that conclusion in a manner consistent with federal law.

Sincerely,



Stephen Bloch
Michelle White
Joe Bushyhead
Southern Utah Wilderness Alliance

Cc: Anita Bilbao, Acting State Director, BLM
Abbie Josie, Acting Associate State Director, BLM
Phil Hanceford, Conservation Director, Agency Policy and Planning, TWS

Exhibit F

Consultation Process on Proposed Improvements to Revised Statute (R.S.)2477 Rights-of-Way

IM 2008-175

Instruction Memorandum

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov>

August 8, 2008

In Reply Refer To:

2800 (350) P

EMS TRANSMISSION 08/22/2008

Instruction Memorandum No. 2008-175

Expires: 09/30/2009

To: All Washington Office and Field Office Officials

From: Director

Subject: Consultation Process on Proposed Improvements to Revised Statute (R.S.)
2477 Rights-of-Way

Program Area: Lands and Realty

Purpose: On May 26, 2006, the Bureau of Land Management (BLM) issued Instruction Memorandum (IM) No. 2006-161 (“Consultation on Proposed Improvements to R.S. 2477 Rights-of-Way”). The IM described the process that the BLM will follow, in consultation with the holder of an R.S. 2477 right-of-way (ROW), when the holder proposes to undertake any construction or improvement (collectively improvement), beyond routine maintenance, on any

portion of the ROW crossing lands administered by the BLM. This IM clarifies and supplements the information set forth in IM No. 2006-161, and hereby replaces it.

For purposes of this Instruction Memorandum, the following definitions are applicable:

- “Holder” means: (1) a state or political subdivision of a state that holds an R.S. 2477 ROW, as adjudicated by a Federal court, or (2) a state or political subdivision of a state claiming to have an R.S. 2477 ROW that has been recognized by the BLM in an administrative nonbinding determination (NBD).
- “Routine maintenance” includes work that is reasonably necessary to preserve the existing road in its present condition, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage, and keeping drainage features open and operable – essentially preserving the status quo.
- “Improvement” includes the widening of the road, the horizontal or vertical alignment of the road, the installation of (as distinguished from cleaning, repair, or replacement in kind of already existing) bridges, culverts, and other drainage structures, as well as any significant change in the surface composition of the route (e.g., going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any other change in the nature of the road that may significantly impact public lands, resources, or other values.

Policy/Action: Before the consultation process described in this IM may occur, the validity of an asserted ROW established under R.S. 2477 must have been adjudicated by a Federal court or recognized by the BLM in an NBD. IM No. 2006-159 (dated May 26, 2006), describes the process for the BLM to follow if it chooses to process an NBD on an asserted R.S. 2477 ROW. When an entity asserting that it holds an R.S. 2477 ROW wants to undertake an improvement, the appropriate BLM State, District, or Field Office (hereinafter appropriate BLM office) should refer to the March 22, 2006, memorandum from the Secretary (Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1988, Policy) and advise the entity of its options.

If the validity of an asserted R.S. 2477 ROW has not been adjudicated as valid by a Federal court or recognized as valid by the BLM in an NBD, the entity asserting that it is the holder of the ROW may not undertake any improvement on the ROW. When an entity undertakes an improvement without such adjudication or NBD and, thus, has not been found to be a holder, the BLM may deem the action a trespass or take other appropriate action to protect the public lands and resources.

When the holder of an R.S. 2477 ROW proposes to undertake any improvement beyond routine maintenance on any portion of the ROW crossing BLM-administered lands, the appropriate BLM Office and the holder will consult in advance of the holder making the improvement.^[1] Consultation between the ROW holder and the BLM is necessary to give the appropriate BLM office the opportunity to carry out its duties as the manager of the public land that may be affected by the proposed improvement. The consultation process described in this IM provides a way for the BLM and the holder to coordinate so that each can exercise its rights in a spirit of

mutual accommodation. See *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 733, 748 (10th Cir. 2005) (SUWA v. BLM).

Copies of this IM should be shared with state, county, and city governments and other appropriate entities to facilitate open communication about the consultation process.

The Consultation Process

A. Relevant Information

When a holder proposes to undertake an improvement beyond routine maintenance, the first step in the consultation process is that the appropriate BLM office will request the holder of the ROW to provide the following information:

- 1) the location of the portion or portions of the ROW on which the improvement is proposed (this can be shown by the submission of a map, aerial photograph, or other appropriate means);
- 2) a description of the proposed improvement, including any engineering plans that have been prepared;
- 3) an explanation of why the proposed improvement is within the scope of the ROW;
- 4) the anticipated time of commencement of activities and an estimate of the time it will take to complete the improvement; and,
- 5) the approximate date when the holder last maintained the ROW and a brief description of the work performed at that time.

If the holder fails or refuses to respond or provide the requested information, the appropriate BLM office will advise the holder in writing that it cannot proceed with the consultation process without the requested information.

B. Information Evaluation

Once the appropriate BLM office receives all the requested information, it will evaluate the information and assess first whether the proposed improvement is within the scope of the ROW. This is generally a question of state law. For example, in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), the Tenth Circuit applied Utah law to determine whether proposed improvements were within the scope of the subject ROW.

If the BLM concludes that the proposed improvement is not within the scope of the ROW, the holder must apply for a Title V ROW under the Federal Land Policy and Management Act (FLPMA) in order to proceed with the proposed improvement. If the BLM concludes that the

proposed improvement is within the scope of the ROW, then the BLM will next assess whether the proposed improvement may adversely impact the surrounding public lands or resources, and if so, whether there are modifications to the proposed improvement that would avoid or minimize such impacts.

See below for more discussions on making these assessments.

Question 1. Is the proposed improvement within the scope of the ROW?

The BLM will first assess whether a proposed improvement is within the scope of the R.S. 2477 ROW. As noted above, whether a proposed improvement is within the scope of the ROW is generally dependent on the law of the state in which the R.S. 2477 ROW exists. As such, the appropriate BLM office should consult with the Solicitor's Office when considering whether a proposed improvement is within the scope of the ROW. As an example, in *Sierra Club v. Hodel*, 848 F.2d at 1083-84, the Tenth Circuit indicated that under Utah law, a project to widen a one-lane dirt road to ensure the safe passage of vehicles driving on the road would likely be considered within the scope of the ROW because the improvement was reasonable and necessary, in order to meet the necessity of increased use and travel, in light of the traditional use(s) of the ROW established as of October 21, 1976, when the FLPMA was enacted. On the other hand, the court also noted that conversion of a two-lane road into an eight-lane highway would not be considered reasonable and necessary. *Id.* at 1083. Thus, to perform such expansion, the ROW holder would be required to apply for a ROW under Title V of the FLPMA.

a. The proposed improvement is outside the scope of the ROW.

If the appropriate BLM office concludes that, under applicable state law, a proposed improvement is outside the scope of the ROW, the BLM will inform the holder of the ROW of its conclusion as soon as practicable. The appropriate BLM office will give the holder an opportunity to review the information on which the BLM's conclusion is based and provide any additional information the holder believes is relevant. The holder may also point to previously submitted information that it believes the BLM did not take into account in assessing whether the improvement is within the scope of the ROW.

If the holder of the ROW does not submit additional information, or submits additional information but the appropriate BLM office still concludes that the proposed improvement is outside the scope of the ROW, the BLM will inform the holder that it may apply for a FLPMA Title V ROW authorizing the proposed improvement. If the holder disagrees with the BLM's conclusion that the proposed improvement is outside the scope of the ROW or declines to apply for a FLPMA Title V ROW, the parties may "resort to the courts." *SUWA v. BLM*, 425 F.3d at 749.

When a holder applies for a FLPMA Title V ROW to undertake a proposed improvement that is outside the scope of the ROW, the appropriate BLM office needs to complete the appropriate level of National Environmental Policy Act (NEPA) analysis and documentation, as well as any other required analysis (e.g., consultation under Section 7 of the Endangered Species Act (ESA)) in considering the Title V ROW application.

- b. The proposed improvement is within the scope of the ROW.

If the BLM concludes that a proposed improvement to an R.S. 2477 ROW is within the scope of the ROW, the next step in the consultation process is to assess whether the proposed improvement may adversely impact the surrounding public lands or resources and, if so, whether there are alternatives or modifications to the proposed improvement that would avoid or minimize such impacts. This step is described below.

Question 2: Whether the proposed improvement may adversely impact the surrounding public lands or resources and, if so, are there alternatives or modifications to the proposed improvement that would avoid or minimize such impacts?

If the appropriate BLM office concludes that the proposed improvement will not adversely impact the public lands or resources, the BLM should promptly advise the holder of the ROW of this. At this point, the consultation process is concluded.

If, however, the BLM concludes that the proposed improvement may adversely impact the public lands or resources, as soon as practicable, the BLM will inform the holder of the ROW of its conclusion and any suggested alternatives or modifications to the proposed improvement that would avoid or minimize such impacts. The appropriate BLM office will also give the holder of the ROW the opportunity to review the information on which the BLM's conclusion is based, meet with the BLM, and provide any additional information to resolve these matters.

In assessing the potential impacts of a proposed improvement, the BLM should consider whether there will be any adverse impacts to cultural resources; sensitive, threatened or endangered species; or any other important features or resources on the public lands. In doing so, the BLM should take into account existing information on such resources in the vicinity of the ROW and decide whether additional information is necessary in order to adequately assess the potential impacts of the proposed improvement. In the event additional information is necessary and available, the BLM should obtain it as expeditiously as possible. The BLM should advise the holder of alternatives or project modifications that would avoid or minimize impacts to these resources. In the event the holder chooses not to implement such alternatives or project modifications, the BLM should consult with the Solicitor's Office on possible appropriate responses.

The holder of an R.S. 2477 ROW does not need to obtain a BLM authorization to undertake a proposed improvement in situations where the BLM has concluded that the improvement is within the scope of the ROW. Thus, there is no Federal action that triggers the requirements of the NEPA, and the BLM is not required to complete a NEPA analysis in assessing the potential impacts of a proposed improvement. Similarly, there is no Federal action that triggers the requirements of the National Historic Preservation Act or the Endangered Species Act. However, it may be useful and efficient for the appropriate BLM office to use its expertise in preparing NEPA and other analyses as it assesses the potential impacts of a proposed improvement. Depending on the nature of a proposed improvement, the BLM may decide that it

would be appropriate to model its assessment on similar analyses that it may have prepared under NEPA. A proposed improvement that would be covered by a categorical exclusion in a circumstance where NEPA did apply (e.g., if a person applied for a Title V ROW), would not need to be further assessed. In addition, the BLM should advise the holder that the holder itself may be subject to these statutes (e.g., the “take” prohibition under Section 9 of the ESA).

The appropriate BLM office should complete the consultation process in a timely and expeditious manner.

Timeframe: This IM is effective upon receipt.

Background: On March 22, 2006, Secretary Norton issued a memorandum entitled “Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1988, Policy” to the Assistant Secretaries of Land and Minerals Management; Fish Wildlife and Parks; Indian Affairs; and Water and Science (Memorandum). Among other things, the Memorandum discussed the legal principles set forth in SUWA v. BLM on the recognition, use, maintenance, and improvement of ROWs obtained under R.S. 2477, and directed all bureaus within the Department of the Interior to revise any existing guidance or policies on R.S. 2477 ROWs to be consistent with the SUWA v. BLM decision and the Memorandum.

Budget Impact: The additional expenditure of funds and staff time is unknown at this time.

Manual/Handbook Sections Affected: The 2800 series Manual/Handbook.

Coordination: This guidance was coordinated with the Solicitor’s Office, the BLM’s Washington Office, and with the BLM State Office technical staffs and managers involved in the R.S. 2477 program.

Contact: If you have any questions or concerns regarding this policy, please contact Jeff Holdren, Lands and Realty Group (WO350) at 202-452-7779 or via email at jeff_holdren@blm.gov.

Signed by:

James L. Caswell

Director

Authenticated by:

Robert M. Williams

Division of IRM Governance, WO-560

[1] Note that when the holder of an R.S. 2477 ROW intends to undertake routine maintenance activities, no such consultation process is necessary. The appropriate BLM office is encouraged, however, to coordinate with holders of R.S. 2477 ROWs before routine maintenance activities are undertaken. As explained by the Tenth Circuit, “communication and cooperation,” and not “unilateral action” should govern the exercise of the ROW holder’s and the BLM’s respective rights. *Id.*